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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

72-362

WINCHESTER TV CABLE CO., INC., *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *Respondents*
WHAG-TV INC., *Intervenor.*

TELEVISION ANTENNA CABLE, INC., *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *Respondents,*
WHAG-TV, INC., *Intervenor.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statutes and regulations involved	2
Statement	3
Reasons for granting the writ	12
Conclusions	24

Appendix A	1a
Appendix B	11a
Appendix C	14a
Appendix D	20a
Appendix E	21a
Appendix F	28a

CITATIONS

CASES:

Abbott Laboratories v. *Gardner*, 387 U.S. 136, 149 (1967)	22
Bolling v. *Sharpe*, 347 U.S. 497 (1954)	23
Bolton v. *Harris*, 395 F.2d 642 (1968)	24
Carter Mountain Transmission Corp. v. *FCC*, 321 F.2d 359, *cert. denied*, 375 U.S. 951 (1963)	10, 12
Citizens Communications Center v. *FCC*, 447 F.2d 1201 (1971)	23
Columbia Broadcasting System v. *United States*, 316 U.S. 407 (1941)	23
Conley Electronics Corp. v. *FCC*, 394 F.2d 620 (10th Cir. 1968), *cert. denied* (1968)	12

Page

Fortnightly Corp. v. *United Artists Television, Inc.*, 392 U.S. 390 (1968) 5
Great Falls Community TV Cable Co. v. *FCC*, 416 F.2d 238 (9th Cir. 1969) 11
Harrell v. *Tobriner*, 279 F.Supp. 22 (1967) 24
Hearst Radio, Inc. v. *FCC*, 167 F.2d 225 (1948) 23
Neild v. *District of Columbia*, 110 F.2d 246 (D.C. Cir. 1940) 23
Pinellas Broadcasting Company v. *Federal Communications Commission*, 230 F.2d 204 (D.C. Cir. 1956) 19
Schneider v. *Rust*, 377 U.S. 163 (1964) 24
Titusville Cable TV, Inc. v. *United States*, 404 F.2d 1187 (3rd Cir. 1969) 12
United States v. *Midwest Video Corporation*, — U.S. — (June 7, 1972) 17
United States v. *Southwestern Cable Co.*, 392 U.S. 157 (1968) 7, 16, 17
Washington v. *United States*, 401 F.2d 915 (1968) 24
Wheeling Antenna Co. v. *United States*, 391 F.2d 179 (4th Cir. 1968) 9, 10, 11

CONSTITUTION OF THE UNITED STATES OF AMERICA:

Fifth Amendment 6, 21, 23, 24
Fourteenth Amendment 6, 21, 23, 24

STATUTES:

Administrative Procedure Act, 5 USC 551(4) 22

Judicial Review Act, 28 USC 1254(1) 2

Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. § 151, et seq.:
Section 1 .....6, 9, 10, 11, 13, 16, 18, 20
Section 2a 13
Section 301 .....13, 18
Section 303(g) 11, 14, 18, 19, 20
Section 303(r) 14
Section 303(s) 14
Section 307(b) 6, 9, 10, 11, 16, 18, 19, 20
Section 605 14

Page

Radio Act of 1927, Public Law 632, 69th Cong. 19

FCC RULES AND REGULATIONS:

47 CFR § 74.1103 .....16, 20, 21
47 CFR § 76.91, 93, 95 20
47 CFR 76.153 5
47 CFR 53.658 20

MISCELLANEOUS:

First Report and Order (to Adopt Rules and Regulations for Microwave Stations to Relay Television Signals to CATV Systems) Docket Nos. 14895, 15233, 38 FCC 683 (1965) 11

Second Report and Order (to Adopt Rules and Regulations Relating to Distribution of Television Broadcast Signals by CATV Systems) Docket Nos. 14895, 15233, 15971, 2 FCC 2d 725 (1966) 18

Report and Order (With Respect to Television Network Programs Not Made Available to Certain Television Stations) Docket No. 16041, 26 FCC 2d 772 (1970) 2, 4, 5, 7, 8, 22, 28a

Memorandum Opinion and Order in re Winchester TV Cable Co., Inc., 29 FCC 2d 432 (1971) 11a

Memorandum Opinion and Order in re Television Antenna Cable, Inc., Front Royal, Va., 30 FCC 2d 610 (1971) 14a

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Petitioners, Winchester TV Cable Co., Inc. (hereinafter "Winchester") and Television Antenna Cable, Inc. (hereinafter "TELACO") request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on June 2, 1972.

OPINION BELOW

The opinion of the Court of Appeals is reported at —— F.2d —— and is annexed hereto as Appendix A, *infra,* p. 1a. The orders of the Federal Communications Commission are reported at 29 FCC 2d 432 and 30 FCC 2d 610 (Apps. B and C, *infra,* pp. 11a, 14a).

JURISDICTION

The judgment of the Court of Appeals was entered on June 2, 1972 (Appendix D, *infra,* p. 20a). The jurisdiction of the Court is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED

Whether the Federal Communications Commission has the power to deprive the American people of the right to *receive* television signals from CATV systems that Federal law permits them to *receive,* in the same area, without CATV? And, whether the Federal Communications Commission's rule, that attempts to so *regulate television reception* and to discriminate against CATV subscribers, is invalid?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The 5th and 14th amendments to the Constitution are set forth in Appendix E, *infra,* p. 21a, Sections 1, 301, 303(g) and 307(b) of the Communications Act of 1934, as amended are set forth in the body of this Petition, pp. 18, and 19, respectively.

REGULATIONS INVOLVED

The rule under review (47 CFR § 74.1103) is also set forth in Appendix E, p. 21a, together with the revision of that rule adopted by the Commission on February 2, 1972 and effective March 31, 1972, as amended

June 26, 1972, effective July 14, 1972 (CFR § 76.91, et seq.)

STATEMENT

These cases arose out of two orders of the Federal Communications Commission denying Petitions for a Waiver of its nonduplication or program exclusivity rule. In the formulation of these orders, the validity of the rule was challenged, and, alternatively, its application in this case has been arbitrary and capricious. The rule and the denials of its waiver, by the Commission, were sustained by the court below, on petition for review under the provisions of 47 USC § 402(a). The rule and the denials of its waiver, by the Commission, were sustained by the court below, on petition for review under the provisions of 47 USC § 402(a).

A. The Facts

Winchester Cable has operated a CATV system in Winchester, Virginia, since 1966, and TELACO has operated one in Front Royal, Virginia, since 1964. Both systems have always received and supplied WRC-TV, Channel 4, the Washington, D.C. National Broadcasting Company (hereinafter "NBC") affiliate, to their subscribers.

The residents of Winchester and Front Royal can and do receive WRC-TV and other VHF stations from Washington, D.C. and have continuously viewed these programs on home antennas for approximately 20 years. The Court below and the Commission have conceded this point. In January 1970, a new UHF station,

[1] A bonus affiliate broadcasts a full network schedule of programming but receives no compensation from the network. In June 1965, the Commission issued a Notice of Proposed Rule Making and a Notice of Inquiry in Docket No. 16041. The second part of that proceeding concerned the provision of network programs

WHAG-TV, Channel 25, Hagerstown, Maryland, began operation as an NBC bonus affiliate.[1] Both CATV systems carry WHAG-TV, as required by the Commission's rules.

WHAG-TV places a Grade A signal contour over Winchester and a Grade B signal contour over Front Royal, Hagerstown, Winchester and Front Royal are presently outside, by short distances, the Grade B contour of WRC-TV—although the Commission has granted WRC-TV's application for a permit to increase the height of its antenna, enabling it to place a Grade B contour over all three of the above communities. When this is done TELACO will no longer be required to protect WHAG-TV's signal because WRC's signal in Front Royal will be of equal priority with WHAG-TV. WRC-TV will have a lower priority in Winchester and, therefore, WRC-TV's signal will still have to be "blacked-out on the Winchester CATV system when WRC-TV carries the same program as WHAG-TV.

WHAG-TV triggered the program exclusivity provisions of the nonduplication rule by requesting that

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to "small market" or "overshadowed" stations, those at some distance from, but not entirely out of reception range of large city stations. This proposal was opposed by the networks. Comments and reply comments were filed and, on December 23, 1970, the Commission released its Report and Order in this proceeding (26 FCC 2d 772, 789, Appendix F, p. 28a). Rules were not adopted by this Report but the Commission's policy was made very clear that network affiliation in these fringe markets was unsatisfactory and must be improved. To this end, the networks were required to file reports and the proceeding was kept open for "whatever subsequent consideration and action may be indicated." Thus, a coersive policy was established far more effective than a rule. The beginning of operations and affiliations of WHAG-TV with NBC occurred during the pendency of this rule-making proceeding.

the two systems provide it with same day (simultaneous, under the revised rule) protection from duplication by certain other NBC affiliates, including WRC-TV.[2]

The Commission is fully informed that network programs are simultaneously duplicated to large populations and areas by television stations licensed by it, as shown by its Report and Order in Docket No. 16041 (Appendix F, p. 28a.)

In fact, the policy of the Commission is not only to encourage, but also to coerce, the networks to permit such duplication of programs by small market television stations to large areas and populations already covered by larger market television station[3] affiliates.

The area normally served by WHAG-TV within the Grade B contour (reference 100%) is supplied NBC programs by various television stations duplicating those of WHAG-TV (Joint Appendix, p. 25 et seq.). The number of duplicating signals and the percentage

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[2] The nonduplication rule is enforced by its terms only on demand by the station with a higher priority signal contour which gives the station with priority the opportunity to require nonduplication by some CATV systems and not others. The Commission's rules (47 CFR § 76.153) also gives *copyright owners* the right to demand exclusivity under some circumstances. This rule, in effect, circumvented this Court's holding in *Fortnightly* v. *United Artists Television, Inc.*, 392 US 390 (1968).

[3] Both the Commission and the court below *ignored* or didn't reach the basic discriminatory issue of why duplication of programs by television stations to large areas and populations promotes the public interest when receiving on a home-owned antenna and duplication by those same stations to miniscule portions of such areas and populations is contrary to the public interest when receiving on a more efficient CATV rented-antenna.

of the WHAG-TV Grade B contour area covered are as follows:

1 service WHAG-TV	2.7%
2 overlapping services	52.8%
3 overlapping services	29.8%
4 overlapping services	14.7%
2 or more services	97.3%
3 or more services	44.5%

Thus, in this case, the Commission has spawned an abundance of off-air duplication of network programs, while restricting it over CATV.

B. The Decision Below

The fundamental approach to this case by the Court below, as expressed in the first paragraph of its Opinion, was to solve the problem of "accomodating in the public interest the competing claims of a local television station and community television systems." The court met this challenge by disposing of the attack on the rule by *assuming* its validity and finding that its application in this case was not arbitrary and capricious.

The validity of the rule was attacked on the ground that (1) it violates Sections 1 and 307(b) of the Communications Act of 1934, as amended, because it does not accord equal treatment to wire and radio and does not provide a fair and efficient allocation of reception service; and (2) it violates the 5th and 14th amendments to the Constitution because it prohibits CATV-users the liberty of receiving the same signals that television stations provide to non-CATV users; it directly contradicts the policies of favoring simultaneous duplication of programs by television stations

over wide areas and large populations adopted in the Report and Order in Docket No. 16041; and expressly prohibits (at the election of the priority station) the CATV system from doing the very same thing in a small area that television stations are permitted and encouraged by the Commission to do over large areas.

In disposing of the arguments relative to the unconstitutional discrimination by the Commission, introduced by Docket No. 16041, the court regarded the Commission's Report and Order as an exhortation to networks to make their services available to small market stations. The court quoted with approval the Commission's claim that the conflicting policies were not inconsistent. Although the court stopped short of the sentence following its quotation, it obviously approved the contention of the Commission contained therein as follows:

> "Even if such [mere duplication of services to an area already actually receiving such network service] were the objective of Docket No. 16041, however, it would be entirely consistent with the intent of the non-duplication rule." (Appendix C, para. 8)

In short, the court approved the validity of a Commission policy (Docket No. 16041), of which the objective was to coerce duplication of programs off-the-air and simultaneously prohibit the reception by the public via CATV the identical duplicated programs in the same area.

The court further assumed that this Court in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968) affirmed unlimited power in the Commission to regulate CATV, whereas this Court limited Commission action to that "not inconsistent with law". The court

then concluded, by assuming the answer to the fundamental question on the power of the Commission to require the "blackout" of off-the-air television signals on CATV, as follows:

> "However, we need not decide whether this difference [transmitters of signals vs. reception of signals] provides a rational basis for the Commission's refusal to apply the same non-duplication policies to both CATV and to broadcasters. The Commission has not yet adopted any rule requiring a network to duplicate its programs in Winchester or Front Royal through multiple station affiliations. Nor do the CATV systems allege that Docket No. 16041, absent a rule, has coerced [4] duplication areas they serve. At best, as the Commission observed, the constitutional attack mounted by Winchester Cable and TELACO is premature." (But the Commission has licensed stations to duplicate network programs to the same areas and protected such duplication by threats. At the same time, the Commission has prohibited such duplication via CATV rules under which one of the duplicating signals must be blacked out. The facts contradict the court.)

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[4] The court apparently did not consider charges that WHAG-TV obtained its bonus affiliation with NBC as a result of the Commission's then pending inquiry in Docket 16041 (p. 13, Petitioners Reply Brief in the court below), nor was the court persuaded of the power of the Commission to "coerce" by using its power to adopt policy which is as effective coercion as law. Note the Commission's coercive language in 26 FCC 2d 796, para. 60:

> "60. In our view, for reasons stated herein, the public interest requires an improvement in the networks' performance in these respects, and we expect it to be improved in the near future. While we are not now adopting any rules in these areas, we will require the networks to report in the near future, by June 30, 1971, a period some seven months hence, on their policies and practices in the respects mentioned above. This proceeding is being kept open for the receipt of this information and whatever subsequent consideration and action may be indicated."

The court disposes of the attack on the nonduplication rule as violative of §§1 and 307(b) of the Communications Act of 1934, as amended, by stating that they are essentially the same as those previously considered by the court in *Wheeling Antenna Co.* v. *United States,* 391 F.2d 179 (4th Cir. 1968), and it would adhere to the views therein expressed.

It is significant that Judge Butzner, who wrote the opinion in this case, was a member of the panel which decided the *Wheeling* case. In that case Judge Bryan noted, in footnote 4,

> "that the question of whether the FCC has authority to regulate CATV is under review by the Supreme Court.... Accordingly, WACO does not argue that point here, but instead reserves it pending the decision of the issue by the Supreme Court."

At another point, the court noted that:

> "The assault was upon the priority of WTRF-TV. On that ground WACO [CATV] contested the appositeness, not the validity of the rule."

The court negatively and unwarrantedly concluded that:

> "Neither the rules nor their administration are shown to be unjust, including the particular rule now in suit."

Thus, even though the validity of the rule was not before the court in the *Wheeling* case, its validity was assumed, based on a statement by the court unsupported by facts or law, in that or any other record that:

> "... to insure its performance a station is entitled to some protection against dilution of its coverage

> through CATV's introduction of the same programs from more removed stations."[5] (Emphasis supplied.)

Thus, these unjustified assumptions are perpetuated in the case at bar as precedent. This is a most unorthodox method of establishing basic principles of law (by default) upon which an entire industry is regulated and the public inconvenienced.

The court brushed aside Petitioner's arguments in this case that the nonduplicating rule violated §§1 and 307(b) of the Communications Act of 1934, as amended, by accepting the assumed validity of the rule in the *Wheeling* case and accepted the conclusion of that case based on that assumption. That conclusion was as follows:

> "...we nevertheless accepted the nonduplication rule as a fair adjustment and accomodation of conflicting claims to first place in the public interest."

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[5] The finding by the court in *Wheeling* that WIIC, the lower priority station, placed a Grade A signal in *Wheeling*, upon which the decision rested, contradicts the basic determination by the court that CATV introduced the same programs from a more distant station. Those duplicating programs were already present in *Wheeling*. Grade A is almost as strong a signal as the principal community contour. An important basis of Winchester's case is that, if the signal is available to a citizen off-the-air, the Commission has no power, in law, to proscribe the type of antenna he uses. Otherwise, the Commission could, without any statutory sanction, prohibit the use, by citizens, of a VHF antenna in certain areas to further its policy of developing UHF. No provision of the Communications Act can be stretched that far. Finally, CATV systems do not "introduce" signals that are available off-the-air without CATV; only distant signals microwaved to an area can be fairly characterized as "introduced" by CATV. In this instance, we make no contention that the Commission does not have the means and authority to control that "introduction" by microwave. *Carter Mountain Transmission Co.* v. *FCC*, 321 F.2d 350, *cert. denied*, 375 U.S. 951 (1963).

The court, in the case at bar, finally concluded that:

> "... the Commission's efforts to assure that the role of CATV and television remained complementary were in keeping with the Communications Act of 1934."

In what way it is in accord with the Act, the court did not disclose. Not one section of the Act was cited [6] — only a series of cases in footnote 10. These cases do not support the conclusion that the Communications Act supports this rule.[7]

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[6] Certainly, neither Section 1 of the Communications Act of 1934, as amended, which places wire and radio on an equal basis, nor Section 307(b), which equates reception with transmission, support the rule requiring the reception antenna service to blackout a signal readily receivable in the community concerned. The Act (Sec. 303(g)) encourages the greater use of radio—not restrictions on its use by citizens when it is provided and intended for their use.

[7] Not one of the cases cited explains how television and CATV are kept complementary by prohibiting the reception, by the public, of signals licensed by the Commission and intended to be received off-the-air. It appears that the objective is to give an advantage to the network affiliated station with the strongest signal rather than to permit the public to receive all signals licensed to serve it with the liberty to choose the station that, overall, presents the best programs. In short, success determined by technology—not overall program content. If there is a problem, it is one of licensing transmission—not reception—of signals intended to be received. In *Wheeling Antenna Company* v. *United States*, 391 F.2d 179 (4th Cir. 1968) the court relied on Commission claims that Sections 1 and 307(b) (38 FCC 683, 699) of the Act cannot be met by reliance on a service delivering signals that cannot be made available to many people. In *Great Falls Community TV Cable Co.* v. *FCC*, 416 F.2d 238 (9th Cir. 1969), the nonduplication rule was held not to violate the First Amendment. The Court, in effect, also approved the Commission's "fear" that, if the public were able to clearly view signals not intended for delivery to them, it would render off-the-air stations uneconomic (38 FCC 683, 700). Both of these cases rely on the Commission's 1965 Report and Order adopting rules for microwave served CATV (38 FCC 683) which does not

REASONS FOR GRANTING THE WRIT

The Commission has no authority to restrict *reception* of television signals that it has licensed to serve the area in question or to discriminate against CATV viewers and, therefore, there is no responsibility to which such authority is reasonably ancillary.

The Decision below clearly involves an important question of Federal law which has not been, but should be, settled by this Court. The Decision below involves the validity of a fundamental power asserted by the Commission to adopt an onerous regulation of cable television which is neither desirable[8], necessary or effective to protect the station predicted to place the

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apply to off-the-air service. In *Titusville Cable TV, Inc.* v. *United States*, 404 F.2d 1187 (3rd Cir. 1968), the Court relied on earlier hearings of the Commission to the effect that CATV could discourage local television. It is clear from the context that the court again relied on the same microwave distant signal policy to govern *non*-microwave off-the-air CATV service. The court, without rationale, merely asserted that the Commission had properly adopted the nonduplication rule. In *Conley Electronics Corp.* v. *FCC*, 394 F.2d 620 (10th Cir. 1968), the local stations were within 60 miles and signals of the distant stations were brought in by microwave. Again, in *Carter Mountain Transmission Corporation* v. *FCC*, 321 F.2d 359 (D.C. Cir. 1963) *cert. denied* 375 U.S. 951 (1963), the distant stations were not licensed to serve nor did they serve the area in question off-the-air. Thus, the cases cited rely either on a principle involving importation of signals into an area by microwave to govern receiption of signals off-the-air or on their facts involve the use of microwave to import distant signals into an area where the signals could not be received off-the-air.

[8] The theory of unfair competition relied on by the Commission to support this rule has been repudiated by the Department of Justice (Petitioners' Brief below, n. 35). Fractionalization of audience by distant station duplication of local network signals, has existed in AM radio almost from the beginning without apparent economic harm to the local station.

higher power in a given community. The power asserted is the power to prohibit a cable antenna television system from receiving directly, off-the-air on its master antenna and distributing to the public the signals of television stations which the public may easily receive directly off-the-air on antennas individually owned, simply because it duplicates a network program carried by a higher priority station.[9] The reason assigned for asserting the authority to impose program exclusivity or nonduplication of programs must be grounded in the ancillary authority of the Commission recognized under Section 152(a) of the Communications Act of 1934, as amended.

There is no inherent authority in the Commission, independent of Congress, to regulate television or cable television. It is necessary, therefore, to look to the Act, the source of the Commission's authority, for guidelines on its responsibility for television broadcasting and the way in which this regulation, requiring the blackout of programs otherwise receivable, is or is not *ancillary* to those responsibilities—not merely in terms of protection of broadcasting, which is highly questionable, but also to the advancement of the objectives of the Communications Act of 1934, as amended.

The purpose of the Act is to make available an efficient *wire* and *radio* communications service (Section 1) and to maintain control over all channels of radio *transmission* (Section 301). The Commission, among

[9] Petitioners filed numerous sworn statements with the Commission demonstrating that, while WHAG-TV had a *stronger* ("higher priority") signal than WRC-TV, WHAG-TV's equipment and staffing are such that the *quality* or *fidelity* of its transmissions are constantly inferior to those of WRC. Hence, when the public receives only WHAG-TV, it receives an inferior signal. The accuracy of those claims and sworn evidence was never rebutted.

other things, has authority to generally encourage the larger and more effective use of radio in the public interest (Section 303(g)); to make such rules and regulations to carry out the Act (Section 303(r)); and to require television receivers to be capable of receiving all frequencies allotted to television broadcasting (Section 303(s)). The Act sets forth a comprehensive regulatory scheme, including provisions for the allocation of frequencies, construction and licensing of broadcast stations, renewals, modifications, revocations or denials and assignment and transfers of station licenses.

No provisions of the Act, directly or indirectly, give the Commission the power to control reception of radio signals, except Section 605. This section specifically provides that it,

> "shall not apply to the receiving, divulging, publishing, or *utilizing the contents* of any radio communications which is broadcast or transmitted... for the use of the general public...." (Emphasis supplied.)

Thus, the Communications Act of 1934 does not provide any authority to blackout signals of one station because it overlaps the signal of another station that carries a duplicating program. Television, by its very nature, is licensed to serve the public as far as its signal can be received off-the-air.

The Commission may control the frequency, hours of operation and power of a television broadcast station, but once having licensed a station, it has no power to prohibit the public from tuning in that station on its receivers or to regulate television antennas or receivers, except as provided in Section 303(s) of the Act (All-Channel Receiver Law).

It would appear to be beyond dispute that the Commission has no power to prohibit the public from watching a television program on a signal that a station is licensed to broadcast and which can be received off-the-air. It must, therefore, follow that there is no regulatory function—indeed, it would be a contradiction to prevent a broadcast signal from being received by the public for whom it was intended. Likewise, it would be a contradiction to maintain that an off-the-air signal can be denied to members of the public for whom it was intended because they use a *rented* antenna instead of home antenna. Such a contradiction in rules obstructs, instead of furthers, the objectives of the Act, i.e., the larger and more effective use of radio and the equitable distribution of reception services.

Thus, if this Decision stands, it will confirm power in the Commission to blackout television signals which duplicate network programs—a power which should not be based on the broad *assumptions* made by the court below. If such powers do exist, the rational basis for them, founded in both the Constitution and the statute, should be clearly marked out.

The administrative process requires great flexibility to solve the problems delegated to it by the Congress. The courts have shown an appreciation for this difficult task. However, the problem of adopting an affirmative national policy and regulatory scheme for cable television, in the public interest, is far too important to be left to the uncertain vacillation of the regulatory agency. It should rest squarely on the shoulders of Congress—where it belongs.

Congress first declined to act on cable television in 1959. Although many sessions of Congress have intervened, there is still little prospect of CATV regulatory

legislation without a real or imaginary crisis. During this 13-year period, no fewer than fourteen [10] bills have been introduced in Congress to regulate CATV—to no avail. In broadcasting, the regulatory scheme is fully set forth in the law—Congress erected sign-posts throughout the Communications Act of 1934, as amended, as to the application of the statutory standard of "public interest, convenience and necessity." In the explosive growth of cable television, it may indeed be tragic if Commission improvised patchwork policies, under a broad authority, are permitted to govern or restrict this important industry. Moreover, if some way is not found to encourage Congress to "take hold of the future" and establish affirmative policy for the regulation of this dynamic cable communications service, with its almost unlimited potential, it could be a great disservice to the public.

The Decision Below Sustains a Nonduplication Rule Which Violates Sections 1, 301, 303(g) and 307(b) of the Communications Act of 1934, As Amended.

Section 74.1103(e) of the Commission's rules violates Sections 1 and 307(b) of the Communications Act of 1934, as amended. In the *Southwestern* case, [11] *the Court was not concerned with the validity of the CATV*

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[10] S. 2303, S. 2653, 80th Cong., 1st Sess.
S. 1044, 87th Cong., 1st Sess.
H.R. 14454, 88th Cong., 2d Sess.
H.R. 7715, 89th Cong., 1st Sess.
H.R. 12914, H.R. 13286, H.R. 14201, 89th Cong., 2d Sess.
H.R. 10268, H.R. 10510, 91st Cong., 1st Sess.
S. 3635, 91st Cong., 2d Sess.
S. 792, S. 2327, 92nd Cong., 1st Sess.
H.R. 15757, 91st Cong., 2d Sess.

[11] *United States* v. *Southwestern Cable,* 292 U.S. 157 (1968).

rules,[12] but, rather, with the Commission's authority under the Communications Act to regulate CATV systems. In the *Midwest* case,[13] the Court held that the cablecasting or origination rule "... preserves and enhances the integrity of broadcast signals and, therefore, is 'reasonably ancillary to the effective performance of the Commission's responsibilities for the regulation of television broadcasting.' "

The Court determined in *Southwestern* that the Commission has the authority, under the public-interest standard, to regulate CATV [14] in a manner not inconsistent with law. It is, therefore, necessary to determine whether the Act contains guidelines for the exercise of this authority—as it does for the other services that the Commission regulates.

The Commission has determined that CATV is neither a common carrier, which would subject it to Title II, nor broadcasting, which would subject it to

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[12] *Supra,* n. 11, the Court stated:

"We must first emphasize that questions as to the validity of the specific rules promulgated by the Commission are *not* now before the Court."

[13] *United States* v. *Midwest Video Corporation,* — U.S. — (June 7, 1972)

[14] *Supra,* n. 11, the Court said:

"There is no need here to determine in detail the limits of the Commission's authority to regulate CATV. It is enough to emphasize that the authority which we recognize today under Section 152(a) is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting. The Commission may, for these purposes, issue 'such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law', as 'public convenience, interest or necessity require', 47 USC § 303(r)."

Title III.[15] The fact is that there are no provisions of the Act specifically designed for the affirmative regulation of CATV. The only apparent benchmark is the following portions of Sections 1, 301, 303(g) and 307 (b) of the Act.

Section 1 of the Communications Act of 1934, as amended, states the purpose of the Act, as follows:

> "For the purpose of regulating interstate and foreign commerce in communications by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide and world-wide *wire and radio communication* service with adequate facilities . . ." (Emphasis supplied.)

Section 301 of the Act provides, in part, as follows:

> "It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio *transmission; . . .*" (Emphasis supplied.)

A review of the Act discloses no provision that broadcasting shall be "the chosen service", that wire services are subordinate or supplementary to it, or that wire is only an auxiliary of radio. Moreover, there is no section of the Act that gives the Commission authority over the reception of broadcast signals. To the contrary, *wire and radio are placed on an equal footing to achieve this fundamental purpose of Congress in building a rapid, efficient, Nation-wide and world-wide radio communications service,* and the regulatory scheme relates entirely to *transmission* (except for all-channel receivers) and not to *reception.*

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[15] *Second Report and Order* in Dockets 14895, et seq., 2 FCC 2d 725 (1966), paras. 15-17 and authorities cited.

Section 303(g) of the Act provides that the Commission shall,

> "Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;"

Section 307(b) provides as follows:

> "(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

Nowhere in the legislative history is there any indication that the words "radio service" did not continue to include both transmission and reception as specifically set forth in Section 9 of the Radio Act of 1927.[16] One is of little value without the other. In fact, the Commission has so recognized it from time to time.[17]

The fact that cable television or CATV materially aids the public in receiving broadcast signals and is in furtherance of the *public's right to receive signals,* which the Commission's *allocations policies* intend them

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[16] Radio Act of 1927, Public Law No. 632, 69th Cong., Sec. 9.

[17] For example, in *Pinellas Broadcasting Company* v. *Federal Communications Commission,* 13 RR 2058, 2061; 230 F.2d 204 (D.C. Cir. 1956), the court stated, in requiring a fair and equitable distribution of service, that Section 307(b) encompasses not only the reception of an adequate signal but also community needs for programs of local interest and importance and for organs of local self-expression. The rules and regulations of the Commission and its decisions demonstrate that it so regards the section.

to receive, is the most flagrant form of discrimination and frustrates Section 307(b) of the Act. Section 74.1103 conflicts with Section 307(b); it arbitrarily prohibits the public from receiving a signal intended for its use via CATV. *It arbitrarily controls reception.*

For the foregoing reasons, Section 74.1103(e) is unlawful—at least insofar as it prohibits the carriage of signals that are readily available off-the-air. It is perhaps the most unwarranted and onerous of the restraints on the growth of CATV devised by the Commission and is in violation of Sections 1, 301, 303(g) and 307(b). As an unlawful discrimination against wire and in restraint of a fair and efficient allocation of a valid and proper reception service, it fully warrants review by the Court.

The Nonduplication Rule, in Contrast to the Policy of the Report and Order in Docket No. 16041, Is So Discriminatory as To Constitute a Violation of the 5th and 14th Amendments to the Constitution.

Section 74.1103(e) (now 47 CFR § 76.91) of the Commission's rules establishes a network nonduplication program rule for CATV systems in small areas and populations, based upon a system of priorities of signal strength contours. This is in direct contrast to the policy of licensing overlapping network affiliates[18]

[18] The Commission's *Television network rule* provides city of assignment exclusivity with no nonduplication protection. 47 CFR 53:658 provides:

> "Territorial exclusivity. No license shall be granted to a television broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another broadcast station located in the same community from broadcasting the network's programs not taken by the former station, or which *prevents or hinders another broadcast station located in a different community from broadcasting any programs of the network organization.* This regulation shall not be construed to prohibit any contract, arrangement, or understanding be-

in a different community and of encouraging and, in fact, coercing networks to affiliate with small market television stations which duplicate network programs of any number of other affiliates of the same network to larger areas and populations.

The discrimination involved in the operation of the rule against CATV systems and its subscribers is so gross as to constitute a violation of the explicit concept of equal protection of the laws of the 14th amendment, as embodied in the "due process of law" provision of the 5th amendment.

Sections 74.1103(e) and (f)[19] make it clear that the Commission fully intends that the public shall not be entitled to use cable television to receive programs which the Commission has licensed a broadcast station to deliver to them; that the public must use and improvise their own antennas—even though located within a service contour expressly provided by the FCC or beyond those contours but well within reception range of the station—is the governing issue before this Court.

The court below has conceded:

> "The CATV systems accurately observe that Docket 16041 fosters simultaneous duplication of network fare in some areas." (Slip Opinion, p. 7)

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tween a station and a network organization pursuant to which the station is granted the *first call in its community* upon the programs of the network organization. As employed in this paragraph, the term "community" is defined as the *community specified in the instrument of authorization* as the location of the station." (Emphases supplied.)

[19] Section 74.1103(e) provides that any system (which operates within the Grade B or higher priority contour of any television station) shall, upon request, maintain that station's exclusivity as a program outlet against lower priority, duplicating signals. Section 74.1103(f) provides that a CATV system shall, upon request of a station entitled to such exclusivity, refrain from duplicating any broadcast by such station on the same day.

But, the court continued, since the Commission "has not yet adopted any rule requiring a network to duplicate its programs in Winchester or Front Royal through multiple station affiliations," the court need not decide whether or not the Commission has unconstitutionally discriminated against CATV by precluding (via 74.1103) similar duplications. Since WHAG-TV's network affiliation took place while the proposed rule was pending in Docket 16041, it is evident that the effect of the pending rule-making and the Commission's Docket 16041 "policy" had the same effect as a "rule". Hence, the court purged the Commission's conduct, or avoided judging it, because, the Commission used the administrative device of adopting a "policy" rather than a fixed rule. In so doing, the court may well be encouraging the Commission to adopt other unlawful requirements—provided that they are characterized as "policies" and are thought to be safe from judicial scrutiny. Clearly, however, the Commission's administrative policy is a rule within the meaning of 5 USC 551(4)[20] and is reviewable as such.[21]

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[20] 5 USC 551 (4) provides as follows:

> "(4) 'rule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . ."

[21] In *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 149 (1967) the Court laid down the test of whether an administrative determination is ripe for review. The Court said:

> "Without undertaking to survey the intricacies of the ripeness doctrine [15] it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has

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[15] See 3 Davis Administrative Law Treatise, c. 21 (1958); Jaffe, Judicial Control of Administrative Action, c. 10 (1965). [p. 413 for instances of FCC "jawbone" administration.]

Perhaps the leading case on the applicability of equal protection of the laws clause of the 14th amendment to the due-process clause of the 5th amendment is *Bolling* v. *Sharpe*.[22] In this case, the Court upheld the challenge to the validity of segregation in the public schools of the District of Columbia. The Court noted that the 5th amendment which is applicable to the District of Columbia does not contain an equal protection clause as does the 14th amendment which applies to the States. The Court said,

> ". . . But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process."[23]

An earlier case, *Neild* v. *District of Columbia*[24] involved a tax on the gross receipts of sales of fruits and vegetables. There, the Court said,

> "To the extent that the 'equal protection of the laws' exist in the District of Columbia it depends

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been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."

See also *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 418-419(1941) FCC Network Rules; *Hearst Radio, Inc.* v. *FCC*, 167 F.2d 225 (1948) FCC Bluebook on Programs; *Citizens Communications Center* v. *FCC*, 447 F.2d 1201, (1971) FCC Renewal Policy.

[22] 347 U.S. 497 (1954)

[23] Footnote omitted.

[24] 110 F.2d 246 (D.C. Cir. 1940).

upon the due process clause of the Fifth Amendment and other provisions of the Constitution which are applicable to the federal government. In a sense it may be said that every citizen is entitled to the equal protection of the laws as they may be adopted and administered by the federal government throughout the land."

A number of subsequent cases are to like effect.[25] It is submitted that the discrimination against CATV's reception of duplicating signals is so discriminatory as to constitute a violation of the 5th and 14th amendments to the Constitution of the United States.

CONCLUSION

The issues are of great importance in the administration of the communications laws of the country and well worthy of this Court's consideration and resolution. The Petition for a Writ of Certiorari should be granted.

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[25] *Schneider* v. *Rust*, 377 U.S. 163 (1964); *Bolton* v. *Harris*, 395 F.2d 642, 643 (1968); *Washington* v. *United States*, 401 F.2d 915, 922 (1968); and *Harrell* v. *Tobriner*, 279 F.Supp. 22 (1967).

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 71-1599

Winchester TV Cable Co., Inc., *Petitioner,*

v.

Federal Communications Commission and United States of America, *Respondents.*

WHAG-TV, Inc., *Intervenor.*

No. 71-1799

Television Antenna Cable, Inc., *Petitioner,*

v.

Federal Communications Commission and United States of America, *Respondents.*

WHAG-TV, Inc., *Intervenor.*

Petitions for Review of Orders of the Federal Communications Commission.

(Argued February 9, 1972—Decided June 2, 1972.)

Before HAYNSWORTH, Chief Judge, WINTER, and BUTZNER, Circuit Judges.

BUTZNER, Circuit Judge:

This petition for review involves the problem of accommodating in the interest of the public the competing claims of a local television station and community antenna tele-

vision systems (CATV). Winchester TV Cable Co. and Television Antenna Cable, Inc. (TELACO, which furnish CATV facilities to Winchester and Front Royal, Virginia, respectively, seek review of Federal Communications Commission orders denying their requests for waivers of the Commission's nonduplication rule.[1] We affirm the Commission.

I

Winchester Cable has operated a CATV system in Winchester, Virginia, since 1966, and TELACO has operated in Front Royal, Virginia, since 1964. Both systems have always supplied Washington, D.C. station WRC-TV, Channel 4, a National Broadcasting Company network affiliate, to their subscribers. In January 1970, a new UHF station, WHAG-TV, Channel 25, Hagerstown, Maryland, began operation as a bonus affiliate of NBC.[2] Both Winchester

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[1] Rule 74.1103(e), 47 C.F.R. § 74.1103(e), requires that any CATV system "which operates, in whole or in part, within the Grade B or higher priority contour of any . . . television station . . . and which carries the signal of such station shall, upon request of the station licensee . . . maintain the station's exclusivity as a program outlet against lower priority or more distant duplicating signals . . ."

When the Commission considered these applications for waiver, 47 C.F.R. § 74.1103(f) provided, "Where a station is entitled to program exclusivity, the CATV system shall, upon the request of the station . . . refrain from duplicating any program broadcast by such station, on the same day as its broadcast by the state . . ." A recent amendment, which does not affect the outcome of this case, prohibits only simultaneous duplication of a network program. Cable Television Report & Order, 24 P & F Radio Reg. 2d 1501, 1546 (1972).

Wheeling Antenna Co. v. United States, 391 F.2d 179, 181 (4th Cir. 1968), contains an explaination of the priorities the Commission assigns to signals.

[2] A bonus affiliate broadcasts a full schedule of NBC programming, but it receives no compensation until it has established a network rate based upon American Research Bureau viewer surveys.

Cable and TELACO carry WHAG programs. The City of Winchester falls within the principal community contour of WHAG, and Front Royal falls within its Grade B contour. Therefore, WHAG provides signals of a higher priority to these communities than WRC. In accordance with the Commission's nonduplication rule, WHAG requested that the two CATV systems refrain from same-day duplication of NBC programs that are carried by both WHAG and WRC.[3] After the parties were unable to reach an amicable adjustment of their programming, Winchester Cable and TELACO submitted requests to the FCC for waiver of the nonduplication rule. Their argument for waiver is two-pronged. The companies challenge the validity of the rule; alternatively, they contend that its application in this case has been arbitrary and capricious. The FCC, one member dissenting, denied their petitions.[4]

The Commission urges us to decline review of the challenges to the rule's validity because the issue was not initially presented to it. The record before the Commission and its orders disclose, however, that *the rule was indeed questioned,* though somewhat sketchily. The issue, therefore, is properly before us. *Cf.* Great Falls Community TV Cable Co. v. FCC, 416 F.2d 238, 239 (9th Cir. 1969).

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[3] The Commission recently granted WRC's application for a permit to increase the height of its antenna enabling it to place a Grade B signal over Front Royal as WHAG now does. When this is done, TELACO will no longer be required to protect WHAG's signal. 47 C.F.R. § 74.1103(e). This prospect, however, is without relevance to the present proceedings. Cedar Rapids Television Co. v. FCC, 387 F.2d 228, 230 (D.C. Cir. 1967).

[4] Television Antenna Cable, Inc., 30 F.C.C.2d 610, 22 P & F Radio Reg. 2d 1084 (1971).

WHAG also requested protection against Winchester Cable's duplication of NBC network programs by WSVA, Harrisonburg, Virginia, and TELACO's duplication by WBAL, the NBC affiliate in Baltimore, Maryland. Both CATV systems sought waivers with respect to these stations, but neither has petitioned for review for this aspect of the Commission's denial.

II

Winchester Cable and TELACO assert that the nonduplication rule denies them equal protection of the laws, as that concept is embodied in the due process clause of the fifth amendment. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954). They predicate their argument on a comparison of the nonduplication rule with the Report and Order of Docket 16041, which they allege articulates a contradictory Commission policy.[5] Briefly, Docket 16041 is an exhortation to the major networks to make their services available to small market stations and to independent UHF stations. Speaking of these stations, the Commission said:

> "[They] are generally the only ones in their communities, and thus their survival in continued operation is very much in the public interest, and must be of high concern to us, under our '307(b)' mandate to provide conditions favorable to the development of local outlets in as many communities of substantial size as possible.
>
> "... It is obvious today that a network affiliation can be the sustenance of many otherwise marginal stations; network affiliation policies can make or break local television stations in moderately small cities ..."[6]

The Commission concluded that it was not appropriate to adopt rules implementing Docket 16041.

The CATV systems accurately observe that Docket 16041 fosters simultaneous duplication of network fare in some areas. This policy, they complain, unconstitutionally dis-

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[5] Amendment of Part 73 of the Commission's Rules with respect to television network programs not made available to certain television stations, Docket 16041, 26 F.C.C.2d 772, 20 P & F Radio Reg. 2d 1687 (1970).

[6] Docket 16041, 26 F.C.C.2d 772, 20 P & F Radio Reg. 2d 1687, 1710 (1970).

criminates against CATV by denying it the advantages of duplication which are allowed television broadcasters.

Responding to this argument, the Commission said:

> "... [F]ar from being inconsistent, the general policy expressed in Docket 16041 and the specific provisions of [the CATV nonduplication rule] are both in fact reflections of the same ultimate general goal: Providing the public with the greatest number of broadcast voices representing the widest possible diversity of sources. Any arguable distinctions between Docket 16041 and the nonduplication rule simply reflect the different directions from which this objective is approached in two very different contexts.
>
> "In Docket 16041 our concern was with discouraging network procedures which operate to deny outright or limit the availability of network programs in many smaller markets. While one result of more liberal network policies in this regard might well be duplication of network services in some areas, this is not to say ... that the Commission's objective is to achieve mere duplication of service to an area already actually receiving such network service."[7]

It is now settled that the Commission can regulate CATV. United States v. Southwestern Cable Co., 392 U.S. 157 (1968). Moreover, since broadcasters function as transmitters of signals, they differ from CATV which facilitates the reception of signals. *See* Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 398 (1968). This distinction exists even though Winchester Cable originates some local programs. *Cf.* Columbia Broadcasting System, Inc. v. Teleprompter Corp., 40 U.S.L.W. 2733 (S.D.N.Y., May 2, 1972). However, we need not decide whether this

[7] Television Antenna Cable, Inc., 30 F.C.C.2d 610, 22 P & F Radio Reg. 2d 391, 393 (1971).

difference provides a rational basis for the Commission's refusal to apply the same nonduplication policies to both CATV and to broadcasters. The Commission has not yet adopted any rule requiring a network to duplicate its programs in Winchester or Front Royal through multiple station affiliations. Nor do the CATV systems allege that Docket 16041, absent a rule, has coerced duplication in areas they serve. At best, as the Commission observed, the constitutional attack mounted by Winchester Cable and TELACO is premature.[8]

The CATV systems also attack the nonduplication rule as violative of §§ 1 and 307(b) of the Communications Act of 1934. They believe the rule demonstrates that the Commission impermissibly favors television broadcasters over CATV and that it unlawfully seeks to regulate competition between them.[9] These charges are essentially the same as those we have previously considered. We adhere to the views expressed in Wheeling Antenna Co. v. United States, 391 F.2d 179 (4th Cir. 1968). There Judge Bryan thoroughly discussed the considerations which led the Commission to adopt the Second Report and Order, 2 F.C.C.2d 725 (1966), and the First Report and Order, 38 F.C.C. 683 (1965), which deal with the public's interest in both television broadcasting and CATV. Acknowledging the legitimacy and importance of CATV, we nevertheless accepted the nonduplication rule as "a fair adjustment and accommodation of conflicting claims to first place in the public interest." 391 F.2d at 183. We also concluded that the Com-

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[8] Winchester TV Cable Co., 29 F.C.C.2nd 432, 21 P & F Radio Reg. 2d 1084, 1085 (1971).

[9] Section 1 of the Act, 47 U.S.C. § 151, states that the Federal Communications Commission was created to make available an efficient wire and radio communication service. Section 307(b), 47 U.S.C. § 307(b), requires the Commission to foster "a fair," efficient, and equitable distribution of radio service" to the several states and communities. Radio communication, of course, includes television. 47 U.S.C. § 153(b).

mission's efforts to assure that the roles of CATV and television remained complementary were in keeping with the Communications Act of 1934.[10] Nothing presented in these cases persuades us to alter these views.

III

Winchester Cable and TELACO buttress their claim that the Commission's denial of their requests for waiver was arbitrary and capricious by alleging that their subscribers prefer WRC over WHAG; that residents of Winchester and Front Royal have a community of interest with Washington, where WRC originates, but not with Hagerstown, Maryland, the location of WHAG; that WRC can be seen by people in Winchester who orient their antennae to Washington; and that another Washington station can be received in Front Royal. These allegations were adequately supported by affidavits and we, like the Commission, accept them as true. Nevertheless, they do not establish that the CATV systems are entitled to waivers. Viewer preference and community orientation are values which the Commission has subordinated to the survival of local television stations. As the Commission observed in Television Antenna Cable, Inc., 30 F.C.C.2d 610, 22 P & F Radio Reg. 2d 391, 393 (1970):

> "Were nonduplication to be afforded on the basis of popularity of distant big city signals rather than on the basis of the competitive impact of their importation on local stations, as the Second Report and Order requires, we would be disregarding the essential purpose of the rule—protection of the economic viability of

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[10] Wheeling Antenna Co. v. United States, 391 F.2d 179, 183 (4th Cir. 1968); *accord*, Great Falls Community TV Cable Co. v. FCC, 416 F.2d 238 (9th Cir. 1969); Titusville Cable TV, Inc. v. United States, 404 F.2d 1187 (3d Cir. 1968); Conley Electronics Corp. v. FCC, 394 F.2d 620 (10th Cir. 1968); *cf.* Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359 (D.C. Cir. 1963).

> local stations—to the ultimate detriment of the public who would thereby lose their only truly local service."

Uniformly, these factors have not justified waivers. *E.g.*, Port Angeles Telecable, Inc. v. FCC, 416 F.2d 243 (9th Cir. 1969); Lake City Cablevision, Inc., 26 F.C.C.2d 1054, 18 P & F Radio Reg. 2d 163 (1970).

The fortuitous reception of WRC signals in Winchester, beyond the station's predicted contour, is not a ground for waiver. This is so although we accept Winchester Cable's assertion that many viewers in Winchester consider the WRC signal superior to WHAG's. Even if Winchester fell within WRC's Grade B contour, WHAG would be entitled to protection because Winchester is within WHAG's principal community contour. 47 C.F.R. § 74.1103(e). Moreover, it must be remembered that the CATV systems can supply WRC's programs to their subscribers. Only WRC's NBC network programs, which are available on cable via WHAG, cannot be duplicated. Despite a substantially similar argument about the comparative merits of the signals from the deleted and protected stations, we upheld the validity of the Commission's system of priorities in Wheeling Antenna Co. v. United States, 391 F.2d 179 (4th Cir. 1968). Likewise, reception of another station's signals in Front Royal does not provide an exception to the application of the nonduplication rule.

Winchester Cable also complains that a denial of its request for waiver will cause it to suffer adverse economic effects forcing it to decrease its local programming. The Commission's waiver procedure, 47 C.F.R. § 74.1109(c)(1), requires the applicant to state fully and precisely all facts which demonstrate the need for relief, and support the allegation that a favorable ruling would serve the public interest. The regulation has been interpreted to require a CATV operator to show "(1) the economic effect of waiver on the local TV station . . . and (2) that . . . nonduplication

will have an unduly disruptive effect on [the CATV] service." Total Telecable, Inc. v. FCC, 411 F.2d 639, 643 (9th Cir. 1969). The CATV systems did not furnish this information. They ignored the effect of duplication on WHAG's advertising revenues, and they failed to supply cost data on their own local programming and the amount of their anticipated loss of income. Because of these omissions, we cannot conclude that the Commission acted arbitrarily.

Winchester Cable and TELACO claim entitlement to waivers on the ground that WHAG's signal is inferior because the station is plagued by a multitude of transmitting difficulties. They filed support affidavits citing instances when WHAG failed to transmit any signals, or encountered problems with either its video or audio transmissions. At the very least the CATV systems assert that the Commission should have afforded them an evidentiary hearing and directed its staff to conduct a field inspection.

The Commission accepted the evidence proffered by Winchester Cable and TELACO, but found that it was unsupported by objective technical information, and, accordingly, denied a hearing.[11] It did not, however, foreclose the CATV systems from pursuing this issue. The Commission explained that "documented demonstration of technically unacceptable service from WHAG would constitute here, as it

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[11] Television Antenna Cable, Inc., 30 F.C.C.2d 610, 22 P & F Radio Reg. 2d 391, 392 (1971); Winchester TV Cable Co., 29 F.C.C.2d 432, 21 P & F Radio Reg. 2d 1084, 1085 (1971).

In denying Winchester Cable's petition for a stay, the Commission (one member dissenting) said:

> "Although we recognize that affidavits, petitions from the public, and comments from community leaders are entitled to some evidentiary weight on the question of signal and picture quality, we do not consider them sufficient, standing alone, to overcome the presumption of service that arises from a predicted contour. No technical data accompanied the allegations of poor quality and operations. Hence the showings made did not persuade us that a hearing was necessary to resolve the allegedly conflicting evidence."

has in other cases, . . . grounds for staying the enforcement of the nonduplication requirements pending elimination of the cause of such unacceptable service." Television Antenna Cable, Inc., 30 F.C.C.2d 610, 22 P & F Radio Reg. 2d 391, 392 (1971). *See also,* Community Service, Inc., 21 F.C.C.2d 719, 727, 18 P & F Radio Reg. 2d 605, 615 (1970).

We find no error in the Commission's ruling. Its insistence that Winchester Cable's and TELACO's claim of signal inferiority be supported by competent engineering data accords with well established Commission policy. *See, e.g.,* Louisiana Cable TV, Inc., 26 F.C.C.2d 209, 20 P & F Radio Reg. 2d 527 (1970); Valley Cable Vision, Inc., 22 F.C.C.2d 395, 18 P & F Radio Reg. 2d 934 (1970). The Commission was not compelled to take evidence when the allegations and supporting papers failed to supply technical data establishing signal inferiority. *Cf.* Wheeling Antenna Co. v. United States, 391 F.2d 179, 182 (4th Cir. 1968). As other courts have noted, the burden placed on the Commission's staff by the large number of waiver requests and the need for expedition justifies strict enforcement of the requirement for a full and precise statement of all pertinent facts. Port Angeles Telecable, Inc., v. FCC, 416 F.2d 243, 245 (9th Cir. 1969); *cf.* Rio Grande Family Radio Fellowship, Inc. v. FCC, 406 F.2d 664, 666 (D.C. Cir. 1968). We conclude, therefore, that the Commission's summary denial of waivers of the nonduplication rule was not arbitrary or capricious.

AFFIRMED.

APPENDIX B

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

SR-17116

In Re:
Winchester TV Cable Co., Inc., Winchester, Virginia
Request for Waiver of Section 74.1103 of the Commission's Rules

Memorandum Opinion and Order

Adopted: May 5, 1971—Released: May 11, 1971

By the Commission: Commissioner Bartley dissenting; Commissioners Robert E. Lee and Wells absent.

1. Winchester TV Cable Co. operates a 12-channel CATV system at Winchester, Virginia. The system serving approximately 2,500 subscribers, carries among others the signals of WRC-TV (NBC), Washington, D.C.; WBAL-TV (NBC), Baltimore, Maryland; WSVA-TV, (NBC-ABC), Harrisonburg, Virgina; and WHAG-TV (NBC), Hagerstown, Maryland. Winchester is within WHAG-TV's predicted principal community contour. WSVA-TV places a predicted Grade B contour over Winchester and WBAL-TV and WRC-TV are distant signals. WHAG, Inc., licensee of WHAG-TV, has requested program exclusivity. Winchester Cable has filed a "Petition for Waiver" of Section 74.1103(e) of the Commission's Rules which urges that it should be granted a waiver of the requirement that it provide program exclusivity vis-a-vis WRC-TV, Washington, D.C. WHAG, Inc. opposed the petition and requested expeditious handling; Winchester replied, WHAG, Inc. responded, and Winchester filed additional comments.

2. In support of its petition, Winchester urges: (a) That Winchester has a community of interest with Washington,

D.C., and has "identified" with Washington, D.C., programming for over 20 years; (b) that deletion of WRC-TV would seriously disrupt the viewing habits of Winchester residents; (c) that the technical quality and operation of WHAG-TV is unsatisfactory and deficient so as to regularly interrupt and/or disrupt network program fare, especially regarding the quality of color programs; (d) that deletion of WRC-TV would result in loss of subscribers and therefore work an economic hardship on petitioner; and (e) that denial of this petition would "ignore and diminish the spirit of the Commission's Report and Order" in Docket No. 16041, FCC 70-1303, 26 FCC 2d 772, "which encourages networks to affiliate with small-market stations—thus creating a multiplicity and duplication of network fare in many areas" and that a possible consequent result of strict enforcement of the provisions of Section 74.1103 would be a denial, to cable systems, of equal protection under the laws.

3. We rule on Winchester Cable's arguments as follows: (a) The *Second Report and Order* explains the Commission's reasons for requiring program exclusivity when a community comes within the predicted contour of a television station, and these reasons do not depend on community orientation or ties; (b) when the Commission adopted the *Second Report and Order* it considered the question of disruption of viewing habits and concluded that same-day exclusivity struck a reasonable balance between the competing interests. We are not persuaded of a need to depart from the conclusion in this case; (c) while a supplement was filed containing a form survey of petitioner's subscribers regarding program and reception quality, the allegation of poor quality and operations is devoid of factual technical data sufficient to overcome the presumption of service that arises from a predicted contour. Indeed, petitioner's own filings indicate that WHAG-TV's signal is available in the area on antennas oriented away from the

station; (d) petitioner has provided no hard data to support this argument or the effect it would have on the system; and (e) no rules have as yet been adopted regarding Docket 16041. In any case, we cannot base our decision here on petitioner's speculation as to the "thrust and probable result" of the Report and Order. While we did say in Docket 16041 that we favor multiplicity and greater availability of network programming in smaller markets, we in no way indicated a preference for mere duplication of service to an area already actually receiving such network service as in the case here. Therefore, any argument as to possible violation of equal protection is, at best, premature.

In view of the foregoing, the Commission finds that a grant of the request waiver of Section 74.1103(e) of the Commission's Rules would not be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Petition for Waiver" filed January 15, 1971 by Winchester TV Cable Co., Inc., IS DENIED.

IT IS FURTHER ORDERED, That Winchester TV Cable Co., Inc. IS DIRECTED to comply with the requirements of Section 74.1103(e) of the Commission's Rules on its CATV system at Winchester, Virginia, within thirty (30) days of the release date of this Memorandum Opinion and Order.

Federal Communications Commission

Ben F. Waple
Secretary

APPENDIX C

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

SR-37102

In Re:
TELEVISION ANTENNA CABLE, INC., FRONT ROYAL, VA.
Request for Waiver of Section 74.1103 of the Commission's Rules

Memorandum Opinion and Order

(Adopted June 30, 1971; Released July 2, 1971)

By the Commission: Commissioners Robert E. Lee and Houser absent; Commissioner Bartley dissenting; Commissioner Wells concurring in the result.

1. Television Antenna Cable, Inc., (TELACO) operates a 12-channel CATV system at Front Royal, Virginia. The system, serving approximately 2,038 subscribers, carries among others the signals of WRC-TV (NBC), Washington, D.C.; WBAL-TV (NBC), Baltimore, Maryland; WSVA-TV (ABC/NBC), Harrisonburg, Virginia; and WHAG-TV (NBC), Hagerstown, Maryland. Front Royal is within WHAG-TV's and WSVA-TV's predicted Grade B contour. WRC-TV and WBAL-TV are distant signals. WHAG, Inc., licensee of WHAG-TV, has requested program exclusivity. Television Antenna Cable, Inc. (TELACO) has filed a "Petition for Waiver" of Section 74.1103 of the Commission's Rules which urges that it should be granted a waiver of the requirement that it provide program exclusivity vis-a-vis WRC-TV and WBAL-TV. WHAG, Inc. opposed the petition and TELACO replied.

2. In support of its petition, TELACO urges: (a) that there would be a disruption of viewing habits should the

requested waiver not be granted; (b) that denial of the request would result in inferior audio and/or visual signals of NBC network fare because WHAG-TV's signal is technically unsatisfactory; (c) that deletion would force the loss of locally oriented programming on WRC-TV because of present technical insufficiencies in existing manufactured switching equipment which prevent quick and precise switching for local inserts on network feeds; (d) that there is a community of interest between Front Royal and Washington, D.C.; (e) that since at least one Washington, D.C. station, WTTG-TV (Ind.), places a predicted Grade B contour over Front Royal, all Washington, D.C. stations should be accorded the same priority status; and (f) that denial of the petition would be contrary to the spirit of the Commission's *Report and Order* in Docket No. 16041 which seeks to encourage networks to affiliate with small-market stations—thus creating multiplicity and duplication of network fare in many areas—and would result in denial of equal protection under the law to cable viewers.

3. None of TELACO's arguments is sufficient on the record before us to justify departure from a rule which has already been found to serve the public interest absent unusual circumstances justifying waiver in a particular case. The initial arguments—that waiver is required because nonduplication would effect established viewing habits—represents no more than a general disavowal of the rule itself, a rule whose necessity and policy bases are detailed in both the *First* and the *Second Report and Order* and have been concurred in by the courts. See, *e.g., Wheeling Antenna Co., Inc.* v. *F.C.C.*, 391 F.2d 179 (4th Circuit 1968). While any system of nonduplication necessarily effects some alteration of viewing habits, it is also true, as we noted in the *Second Report and Order*, that same day nonduplication "while not wholly eliminating any possible change in viewing time on the pertinent day . . . clearly minimizes any disruptive effect on the CATV views." *Second Report and Order*, 2 FCC 2d

725, 747–48. TELACO does not suggest any reason why this case differs from any other with respect to the disrupting effects of the rule.

4. The argument concerning technically unsatisfactory performance by WHAG is wholly unsupported by the requisite technical data and consists of no more than enumeration of several asserted instances of technical difficulties, with respect to which it might be noted that all but two of the alleged difficulties (those two being mentioned for the first time in TELACO's reply pleading) occurred during the initial period of WHAG-TV operation. It should be stressed in this regard, however, that our primary concern in promulgating these or any rules in maximizing service to the public, whose interest is paramount to the private interest of either the petitioner or WHAG. For this reason documented demonstration of technically unacceptable service from WHAG would constitute here, as it has in other cases (see, *e.g., Black Hills Video Corp.*, 2 FCC 2d 243; 465), grounds for staying the enforcement of the nonduplication requirements pending elimination of the cause of such unacceptable service. Likewise, however, and for the same reason, insufficiently supported charges cannot defeat enforcement of a rule which has already been found to ensure optional service to the public from both CATV and broadcaster.

5. The argument that local programming would be lost because technical inadequacies in existing switching equipment would preclude the quick and precise switching essential for local inserts in network feeds is wholly conclusory. Moreover, even if the state of the art is in fact such that automatic switching equipment is inadequate, no reason appears why manual switching could not be employed.

6. Petitioner also suggests that waiver is necessitated with respect to the distant signal of WRC because Washington, D.C. and Front Royal, Virginia share a community

of interest and because another Washington television station in fact includes Front Royal within its Grade B contour. Again, as with the contention concerning disruption, TELACO is essentially challenging not the propriety of enforcing the rule in this case but the propriety of having such a rule in the first instance. The *Second Report and Order* explains the Commission's reasons for requiring nonduplication when a community comes within the predicted contours of a television station and these reasons do not depend on community orientation or ties. Were nonduplication to be afforded on the basis of popularity of distant big city signals rather than on the basis of the competitive impact of their importation on local stations, as the *Second Report and Order* requires, we would be disregarding the essential purpose of the rule—protection of the economic viability of local stations—to the ultimate detriment of the public who would thereby lose their only truly local service. Additionally, with respect to TELACO's reliance on the fact that another Washington station includes Front Royal within its Grade B contour, it should be noted that the nonduplication rule is intended to protect against carriage of outside signals whose competitive impact results from their carriage on a CATV system rather than from the strength of their off the air signals. Thus, the fact that another Washington, D.C. station places a predicted Grade B contour over Front Royal is immaterial to the priority status of a station, such as WRC, which does not place a contour over the area.

7. TELACO's final asserted reason for grant of a waiver is that the *Report and Order* in Docket 16041, despite the fact that we declined therein to adopt rules, encourages a multiplication of duplicated network programs in many areas, that the nonduplication rule discourages the same thing and that simultaneous adherence to both the spirit of the *Report and Order* and the letter of the nonduplication rule amounts to denial of equal protection. While, as we

noted in response to the same contention in *Winchester TV Cable Co., Inc.*, 29 FCC 2d 432, any argument based on speculation as to the "thrust and probable result" of Docket 16041 is essentially premature at this time, the fact that it has now twice been relied upon in a manner which misconceives the relationship between the two policies indicates the advisability of a few further observations. Most fundamentally, it should be noted that far from being inconsistent, the general policy expressed in Docket 16041 and the specific provisions of Rule 74.1103(e) are both in fact reflections of the same ultimate general goal: providing the public with the greatest number of broadcast voices representing the widest possible diversity of sources. Any arguable distinctions between Docket 16041 and the nonduplication rule simply reflect the different directions from which this objective is approached in two very different contexts.

8. In Docket 16041 our concern was with discouraging network procedures which operate to deny outright or limit the availability of network programs in many smaller markets. While one result of more liberal network policies in this regard might well be duplication of network services in some areas, this is not to say, as we noted in *Winchester TV Cable Co., Inc., supra,* that the Commission's objective is to achieve "mere duplication of service to an area already actually receiving such network service." Even if such were the objective of Docket 16041, however, it would be entirely consistent with the intent of the nonduplication rule. In the CATV context, the controlling consideration is protection of local television service because the loss of that service in and of itself destroys the fundamental broadcast service mandated by the Act. Accordingly, while multiplication of services of any kind is a generally desirable objective, it is clearly not desirable in a context where addition of new services, as by CATV importation, has the ultimate effect of deleting or diminishing the quality of old services. Likewise, the nonduplication rule, which on its face could be

said to diminish the number of services available at a given moment (although in fact it does not diminish but simply reschedules) is in fact designed to ensure against a diminuation of service by protecting the economic viability of local stations.

9. In view of the foregoing, the Commission finds that a grant of the requested waiver of Section 74.1103 of the Commission's Rules would not be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Petition for Waiver" filed February 25, 1971, by Television Antenna Cable, Inc., IS DENIED.

IT IS FURTHER ORDERED, That Television Antenna Cable, Inc., IS DIRECTED to comply with the requirements of Section 74.1103 of the Commission's Rules on its CATV system at Front Royal, Virginia, within thirty (30) days of the release of this Memorandum Opinion and Order.

Federal Communications Commission,

Ben F. Waple,
Secretary.

APPENDIX D

[Filed June 2, 1972]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 71-1799

Television Antenna Cable, Inc., Front Royal Virginia,
Petitioner,

v.

Federal Communications Commission and
United States of America,
Respondents.

WHAG-TV, Inc., *Intervenor.*

On Petition for Review of an Order of the Federal Communications Commission

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THIS CAUSE came on to be heard upon the petition of Television Antenna Cable, Inc., for review of a memorandum opinion and order issued against it by the Federal Communications Commission on July 2, 1971, in proceedings before the said Board known upon its records as Case No. FCC 71-700; and upon a certified list in lieu of a transcript of the record; and the said cause was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered adjudged and decreed by the United States Court of Appeals for the Fourth Circuit, that the order of the Federal Communications Commission is affirmed.

/s/ Samuel W. Phillips
Clerk

APPENDIX E

Constitution of the United States

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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RULES AND REGULATIONS OF THE FEDERAL COMMUNICATIONS COMMISSION

§ 74.1103* Requirements relating to distribution of television signals by community antenna television systems.

No community antenna television system shall supply to its subscribers signals broadcast by one or more television

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*This section was deleted when 47 CFR § 76.91 *et seq.* were adopted, 37 FR 3278. The change in text has no effect on this proceeding.

stations, except in accordance with the following conditions:

(a) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized and operating television broadcast and 100 watts or higher power translator stations in the following order of priority, upon the request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations within whose principal community contours the system or the community of the system is located, in whole or in part;

(2) Second, all commercial and noncommercial educational stations, within whose Grade A contours the system or the community of the system is located, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose Grade B contours the system or the community of the system is located, in whole or in part;

(4) Fourth, all commercial and noncommercial educational television translator stations operating in the community of the system, in whole or in part, with 100 watts or higher power.

(b) *Exceptions.* Notwithstanding the requirements of paragraph (a) of this section,

(1) The system need not carry the signal of any station, if (i) that station's network programming is substantially duplicated by one or more stations of higher priority, and (ii) carrying it would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station.

(2) In cases where (i) there are two or more signals of equal priority which substantially duplicate each other,

and (ii) carrying all such signals would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station, the system need not carry all such substantially duplicating signals, but may select among them to the extent necessary to preserve its ability to carry the signals of independent commercial educational stations.

(3) The system need not carry the signal of any television translator station if: (i) The system is carrying the signal of the originating station, or (ii) the system is within the Grade B or higher priority contour of a station carried on the system whose programming is substantially duplicated by the translator; *Provided, however,* That where the originating station is carried in place of the translator station, the priority for purposes of paragraph (e) of this section shall be that of the translator station unless the priority of the originating station is higher.

(4) In the event that the system operates, or its community is located, within the Grade B or higher priority contours of both a satellite station and its parent station, the system need carry only the station with the higher priority; if the satellite station and its parent station are of equal priority, the system may select between them.

(c) *Special requirements in the event of noncarriage.* Where the system, does not carry the signals of one or more stations within whose Grade B or higher priority contour it operates, or the signals of one or more 100 watts or higher power translator stations located in its community, the system shall offer and maintain, for each subscriber, an adequate switching device to allow the subscriber to choose between cable and noncable reception, unless the subscriber affirmatively indicates in writing that he does not desire this device.

(d) *Manner of carriage.* Where the signal of any station is required to be carried under this section,

(1) The signal shall be carried without material degradation in quality (within the limitations imposed by the technical state of the art);

(2) The signal shall, upon request of the station licensee or permittee, be carried on the system on the channel on which the station is transmitting (where practicable without material degradation); and

(3) The signal shall, upon the request of the station licensee or permittee, be carried on the system on no more than one channel.

(e) *Stations entitled to program exclusivity.* Any such system which operates, in whole or in part, within the Grade B or higher priority contour of any commercial or noncommercial educational television station or within the community of a fourth priority television translator station, and which carries the signal of such station shall, upon request of the station licensee or permittee, maintain the station's exclusivity as a program outlet against lower priority or more distant duplicating signals, but not against signals of equal priority, in the manner and to the extent specified in paragraphs (f) and (g) of this section.

(f) *Program exclusivity; extent of protection.* Where a station is entitled to program exclusivity, the CATV system shall, upon the request of the station licensee or permittee, refrain from duplicating any program broadcast by such station, on the same day as its broadcast by the station, if the CATV operator has received notification from the requesting station of the date and time of its broadcast to be deleted, as soon as possible and in any event no later than 48 hours prior to the broadcast to be deleted. Upon request of the CATV system, such notice shall be given at least eight days prior to the date of any broadcast to be deleted.

(g) *Exceptions.* Notwithstanding the requirements of paragraph (f) of this section,

(1) The CATV system need not delete reception of a network program if, in so doing, it would leave available for reception by subscribers, at any time, less than the programs of two networks (including those broadcast by any stations whose signals are being carried pursuant to the requirements of this section);

(2) The system need not delete reception of a network program which is scheduled by the network between the hours of 6 and 11 p.m., eastern time, but is broadcast by the station requesting deletion, in whole or in part, outside of the period which would normally be considered prime time for network programming in the time zone involved;

(3) The system need not delete reception of any program consisting of the broadcast coverage of a speech or other event as to which the time of presentation is of special significance, except where the program is being simultaneously broadcast by a station entitled to program exclusivity; and

(4) The system need not delete reception of any program which would be carried on the system in color but will be broadcast in black and white by the station requesting deletion.

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Subpart F—Program Exclusivity

§ 76.91 Stations entitled to network program exclusivity.

(a) Any cable television system operating in a community, in whole or in part, within the Grade B contour of any television broadcast station, or within the community of a 100-watt or higher power television translator station, and that carries the signal of such station shall, on request of the station licensee or permittee, maintain the station's exclusivity as an outlet for network programming against lower priority duplicating signals, but not against signals of equal priority, in the manner and to the extent specified in §§ 76.93 and 76.95.

(b) For purposes of this section, the order of priority of television signals carried by a cable television system is as follows:

(1) First, all television broadcast stations within whose principal community contours the community of the system is located, in whole or in part;

(2) Second, all television broadcast stations within whose Grade A contours the community of the system is located, in whole or in part;

(3) Third, all television broadcast stations within whose Grade B contours the community of the system is located, in whole or in part;

(4) Fourth, all television translator stations with 100 watts or higher power, licensed to the community of the system.

(c) If the signal of a television broadcast station licensed to a community in a smaller television market is carried by a cable television system, pursuant to § 76.57(a)(4), such signal shall, on request be afforded network program exclusivity. This provision shall not be applicable to any signal authorized or lawfully carried by a cable television system prior to March 31, 1972.

§ 76.93 Extent of protection.

(a) Where the network programming of a television station is entitled to program exclusivity, the cable television system shall, on request of the station licensee or permittee, refrain from simultaneously duplicating any network program broadcast by such station. If the cable operator has received notification from the requesting station of the date and time of its broadcast of the program and the date and time of any broadcast to be deleted, as soon as possible and in any event no later than 48 hours prior to the broadcast to be deleted. On request of the cable system, such notice shall be given no later than the Monday preceding the calendar week (Sunday-Saturday) during which exclusivity is sought.

(b) Notwithstanding the provisions of paragraph (a) of this section, on request of a television station licensed to a community in the Mountain Standard Time Zone that is not one of the designated communities in the first 50 major

television markets, a cable television system shall refrain from duplicating any network program broadcast by such station on the same day as its broadcast by the station. Where a cable system is required to provide same-day program exclusivity, the following provisions shall be applicable:

(1) A cable television system need not delete reception of a network program if, in so doing, it would leave available for reception by subscribers, at any time, less than the programs of two networks (including those broadcast by any stations whose signals are being carried and whose program exclusivity is being protected pursuant to the requirements of this section):

(2) A system need not delete reception of a network program which is scheduled by the network between the hours of 6 and 11 p.m., eastern time, but is broadcast by the station requesting deletion, in whole or in part, outside of the period which would normally be considered prime time for network programming in the time zone involved.

§ 76.95 Exceptions.

Notwithstanding the requirements of § 76.93:

(a) A cable television system need not delete reception of any program which would be carried on the system in color but will be broadcast in black and white by the station requesting deletion.

(b) The Commission will give full effect to private agreements between operators of cable television systems and local television stations which provide for a type or degree of network exclusivity which differs from the requirements of §§ 76, 91 and 76.93.

APPENDIX F

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

In the Matter of
Amendment of Part 73 of the Commission's Rules With Respect to Television Network Programs Not Made Available to Certain Television Stations
Report and Order

(Adopted December 9, 1970; Released December 23, 1970)

By the Commission: Commissioner Bartley absent; Commissioner Wells concurring in part and dissenting in part and issuing a statement.

1. This proceeding, designed to make network television programs more generally available, was begun by Notice of Proposed Rule Making and Notice of Inquiry released June 9, 1965 (FCC65-484). As set forth in this document, the proceeding has two parts: (1) proposed rules designed to require the networks to make programs not cleared by their regular affiliates ("uncleared programs") more readily available to other stations in the same community or market; and (2) a proposed rule, and the Notice of Inquiry, concerning the provision of network programs to "small market" or "overshadowed" stations, those at some distance from, but not entirely out of reception range of, large city stations (*e.g.*, Ada, Oklahoma, and Marion, Indiana).

2. Comments in response to this Notice were filed late in 1965, and reply comments until January 3, 1966. On March 25, 1970 (released March 26, FCC 70-309), the Commission issued a "Notice and Order Setting Oral Argument" concerning the first of the two parts of the proceeding. The oral argument was held April 30, 1970, as scheduled. Two parties availed themselves of the opportunity

mentioned in this Notice and Order to file additional material, six participated in the oral argument, and five of these later filed addition material in response to requests made during the argument.

3. Because the two parts of the proceeding though related, are separate and have received a different amount of attention, they are treated separately herein. Part I of this Report and Order relates to the first, or "uncleared program" portion of the proceeding; Part II relates to the "small market" matter.

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Part II: Making network programs available to "small market" stations

43. The second part of this proceeding relates to making available network programs to "small market" stations at some distance from, but not completely out of range of, large-city affiliates, stations in places such as Ada, Oklahoma and Marion, Indiana, 60 to 65 miles from Oklahoma City and Indianapolis. It was proposed in the 1965 Notice to adopt a rule that when an affiliate in a city is carrying or about to carry a network program, and the advertiser wishes to place the program also on a station in another community, the network shall in good faith attempt to place the program on the other station. The Notice of Inquiry raised questions as to whether the networks should be required to affiliate with or furnish substantial amounts of programming to such stations, what standards would be appropriate for use in this connection (distance, location within signal-intensity contours, "duplicated" and "incremental" circulation, circulation of the large-city station in the home county of the small market station), and to what extent the standards should be different for sustaining programs, commercial programs where the advertiser or all advertisers involved wished to order the smaller market, and commercial programs where some but not all of the advertisers wanted to do so.

44. Three parties supported the proposal, all in brief comments. These included an individual named Walter B. Sitrick (not otherwise identified) in a very brief statement, the licensee of Station WTAF-TV, Marion, Ind. (which has since ceased operation), and a UHF permittee at Danville, Va. (previously operating but had suspended operation and permit has now been deleted). The Marion station urged the importance of network programs, asserting that national advertisers will "buy" the station if it presents them but not otherwise. The chief complaint was *inability to get rebroadcast consent* from Indianapolis and Fort Wayne stations to pick up the programs. It was urged that such stations should be required to give consent; and that there is no legitimate reason for not doing so where the advertiser is willing to "buy" the small-market as well as the large-city station. The Danville permittee emphasized the importance of network programming, as indispensable to successful operation in a small market (as it had discovered in its brief operating experience), and that it should be more readily available to help the development of UHF. Danville's "fringe" location was emphasized.

45. Most of the parties opposing the "uncleared program" rule, mentioned above, opposed Commission action in this respect also, including particularly the three networks, CBS and NBC affiliates, and Meredith. Many of the same arguments noted above were urged, including the undesirability of inflexible over-all regulation and government "injection" into private business dealings. It was asserted that any rule is unnecessary, since the networks try to achieve coverage of all of the nation now, and CBS and NBC claim coverage of more than 95% of the nation's TV homes. This effort includes affiliation with, or furnishing numerous programs to, many stations in small markets, and many stations within the Grade B contours of other stations. It was urged that any further requirement in this regard would result in wasteful *duplication* of cover-

age—two stations bringing the same programs to the same audience—harmful to advertisers because it wastes their money, to the medium because it becomes inefficient, to both stations involved because it hurts the value of their service and thus ultimately their revenue, and to the public by providing less diversity of programming in what is, often, much the same area. It was also claimed that it would hurt the "large city" station being duplicated, not only by decreasing its audience for the particular program duplicated, but also for adjacent programs; and that to the extent some of the advertisers involved might not want to make the duplicating "buy", they would be hurt by having their money wasted. The networks asserted that often they do try to honor advertiser's requests for the small-market station, *e.g.*, NBC in the one case where a network advertiser wanted to buy the Marion station.

46. With respect to the two situations specifically mentioned, it was pointed out that the Ada, Oklahoma station has been an ABC affiliate since going on the air in 1954 and also carries substantial amounts of NBC and CBS programs, with 23½ out of 24½ prime time hours in 1964-1965 devoted to network programs. As to the Marion situation, it was pointed out that while this station is some 60 miles from Indianapolis it is only about 45 miles from Fort Wayne, also with three network-affiliated stations, and less than 30 miles from Muncie, with one network affiliate. Thus, the Grade B contours of 7 stations include part or all of the "home county".

47. NBC affiliates presented a study derived from the "Fisher Report" filed in 1964 in the CATV proceedings (Dockets 14895 and 15233). It was shown that of 487 operating stations in the continental U.S. at that time, only 48—roughly 10%—did not carry as much as 40 half-hours per week of prime-time network programming (80% of prime hours) in March 1964. Of the 48, 24 were independents in large markets where there are three network

affiliates. Of the remaining 24, all but two carried at least 20 half-hours. The two, stations at Jonesboro, Ark. and Bowling Green, Ky. (both VHF) carried no network programming. It was claimed that the degree of overlap involved (with Memphis and Nashville, respectively) justified their not being offered network programs (both are within the Grade B contours of stations in these cities, and both put Grade B signals fairly close to the cities).

48. With respect to the present situation, the distribution of television network programs in the United States is widespread, and a substantial majority of U.S. television stations are network-affiliated, or else receive programs on a "per program" basis in substantial amount.[12] The two stations mentioned above as carrying no network programming in 1964, at Jonesboro, Ark. and Bowling Green, Ky., are now ABC affiliates. Of the "independent stations in the United States, a large number are located in cities which also have three regular network affiliates, or are quite close to such cities, and therefore they would not be expected to present network programming to any substantial extent as "alternate" stations dealt with in Part I of this Report, above. Also, we are not primarily concerned here with the few remaining situations where there are two VHF affiliated stations in a city or market and one UHF station which has not yet been able to get an affiliation with one of the networks, such as Augusta, Georgia and Raleigh-Durham, North Carolina. These are under consideration in another proceeding, Docket 18927.

49. However, by no means all of the "independent" stations not presenting network programming in substantial amount fall into the above categories. For example, in the Marion situation mentioned, where that station had to

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[12] According to the Commission's report TV Financial Data—1969 (Mimeo No. 53051), released July 24, 1970, of 598 regular (non-satellite) stations reporting, 516 were network-affiliated and 82 were independent.

cease operation in the spring of 1969, the city, former station location and county are within a number of outside Grade B contours, as mentioned above; but the city and former station location are not within any outside Grade A contours, and there was only a small area of "Grade A overlap" with one of the Indianapolis VHF stations (none with the other two, Fort Wayne or Muncie stations). There are other somewhat similar situations. In *Muskegon,* Michigan, where a UHF station operated until recently, the city and station location are fairly close to Grand Rapids (35 miles) and quite close to the location of the Grand Rapids Channel 13 station; but it is over 50 miles to the location of the other two VHF stations in the Grand Rapids-Kalamazoo market (74 miles to Kalamazoo), and they put only a Grade B signal over Muskegon. In *Modesto,* California, while that city and its station are fairly close to Stockton (27 miles city-to-city, slightly more from the Modesto transmitter), it is roughly 50 miles from the city and station to the location of the Stockton and Sacramento VHF network stations, and some 70 miles to Sacramento. These stations provide Grade B or better signals to Modesto; two put a Grade A signal over Modesto and one over the Modesto station's location. *Pocatello,* Idaho, where an independent VHF station operates, is within the Grade A contours of two Idaho Falls stations but not within the Grade B contour of any other station. *Fond du Lac,* Wisconsin, and its UHF station are within the Grade B contour of Milwaukee and Green Bay VHF stations, but within the Grade A contours of only one Green Bay network affiliate (it is about 54 miles between these cities, 39 miles between transmitters), *Jamestown,* New York, where a UHF station formerly operated, is within the Grade B contours of three Buffalo and three Erie stations, but within the Grade A contour of only the Erie VHF station (city-to-city distances are 43 miles to Erie and 57 miles to Buffalo). Other cases in which the city and station site are fairly far from the larger-city stations (although one or both are

within three network Grade A contours) include *Hickory*, N.C., 44 miles to Charlotte; *Salem*, Oregon, 44 miles to Portland (more from the Salem station's site) and *Canton*, Ohio, 43 miles to Youngstown (less between sites) and 21 miles from Akron, with one network affiliate.[13]

50. There are, of course, numerous cases in which the networks affiliate with stations fairly close together. This is particularly true where both are in large cities or markets, such as Washington-Baltimore (35 miles city-to-city), Boston-Providence/New Bedford (41 miles Boston-Providence), and ABC in Cleveland-Akron, Ohio (30 miles city-to-city, less than 25 miles between transmitters). It is also true to some extent where the markets are not so large; for example the UHF station at Anderson, S.C. has affiliation arrangements with ABC and CBS; the VHF station at Spartanburg, S.C. (in the Greenville-Spartanburg-Asheville market) is also a CBS affiliate, the distances being about 48 miles city-to-city and 50 miles between transmitters. NBC and CBS have secondary affiliations with a station in Tuscaloosa, Alabama, some 50 miles from Birmingham. There are also a few cases where networks are regularly affiliated with two or more stations located close together and in the same market. For example, CBS is affiliated with three UHF stations in the Harrisburg-Lancaster-Lebanon-York (Pa.) market, with transmitters less than 30 miles apart; and NBC is affiliated with UHF sta-

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[13] As to the small-city station's penetration of the larger city, the Canton station puts a Grade A signal over Akron and the Modesto station puts a Grade A Signal over part of Stockton. The Fond du Lac and Salem stations provide a Grade B signal just beyond Green Bay and Portland respectively, the Jamestown station's Grade B contour included Erie but not Buffalo, and the Canton station provides a Grade B signal to part of Youngstown. Pocatello includes Idaho Falls (but no other station locations) within its Grade B contour. The Hickory and Muskegon stations do not, or did not, significantly penetrate the larger city. The Modesto station's Grade B contour does not include Sacramento or the sites of the stations in that market.

tions at New Britain-Hartford and Waterbury, Conn. in the Hartford-New Haven market, with transmitters only about 16 miles apart. With NBC also affiliated in the nearby Springfield, Mass. market, this means three stations within about 40 miles presenting the same NBC programs.

51. *Conclusions as to "small market" stations.* Here, as with the "uncleared program" portion of this proceeding, we conclude that no final action is warranted *at this time.* However, while the over-all situation in this area is probably somewhat better than it is with respect to "uncleared programs", we conclude that it is not by any means completely satisfactory, and must be carefully studied in the near future.

52. It must be borne in mind that the stations involved here—such as those mentioned in the last few paragraphs—are generally the only ones in their communities, and thus their survival and continued operation is very much in the public interest, and must be of high concern to us, under our "307(b)" mandate to provide conditions favorable to the development of local outlets in as many communities of substantial size as possible. This has long been one of our basic allocations objectives, in television as in the radio broadcast services, as emphasized in the 1952 Sixth Report and Order establishing the present basic television allocation framework. The public interest in the development and viability of these stations is probably higher, and certainly at least as high, as it is in the success of the independent UHF stations which have been the primary object of our concern in Part I of this proceeding, above.

53. In the Sixth Report and Order of 1952, the Commission established a Table of Assignments for the licensing of UHF and VHF stations in the expectation that areas of "no service or inadequate service be kept at a minimum" and that the demonstrated desire for broadcasting stations to meet local needs and interests be met. Particularly, we

indicated an expectancy that by fixing a channel reservation many communities which at the time could not support a station would ultimately be able to do so. It is obvious today that a network affiliation can be the sustenance of many otherwise marginal stations; network affiliation policies can make or break local television stations in moderately small cities. Our concern that network affiliation practices coincide with our efforts to encourage the establishment of a nationwide system is evinced by our rule prohibiting efforts being made upon networks by their affiliates with regard to their affiliation with stations in other markets (Section 73.658). If, with or without outside influence, the network (unreasonably denies programs to television stations serving areas otherwise without its service, that denial disserves the public and may spell the bankruptcy of the station as in Marion, or, at least, the cessation of operation as in other cases mentioned. CATV becomes the only recourse. The growth of CATV is generally ascribed to inadequacies of off-air signals in quantity and quality in extensive areas of the United States.

54. In light of these considerations, the unavailability of network programs to stations in places such as Marion, and some of the others mentioned, must be regarded as unsatisfactory, and we must, and do, expect the networks to take steps to increase such availability. We recognize that this situation is a complex one, and we do not here say what such steps should be, whether they should involve a formal review and revision of affiliation procedures and criteria, or *ad hoc* exceptions. But, in our judgment, in at least some of the situations mentioned the present situation must be altered.

55. As indicated above, much of the discussion of the Marion and Ada situations, in the comments herein, was in terms of "Grade B contours", and how these stations' coverage areas (and cities and home counties) receive other Grade B signals. To the extent that this means the net-

works use "Grade B coverage" as a criterion determining affiliation *vel non*, we believe that an erroneous standard is being employed. In our judgment, use of the Grade B criterion, to the extent it is employed in this connection, has substantial deficiencies, resulting in fewer affiliated stations than there would be if more liberal standards prevailed, and thus fewer stations with the economic base so important to successful operation. The fact that a given community or area receives a "Grade B" signal does not, of course, mean satisfactory reception is guaranteed; "Grade B" is defined as a signal intensity sufficient to provide expected service at 50% of the locations 90% of the time, and, in addition, it does not take into account co-channel or adjacent channel interference. Thus, to the extent it is used, reliance on this criterion results both in fewer stations obtaining programs so necessary to their operation, and less availability of the programs to the public. The criterion must be changed if the number of stations is to approach the opportunities therefor provided in the Table of Assignments.

56. Moreover, as indicated above, when the situation appears to warrant it, the networks affiliate with stations situated well within the Grade B contours of other stations, and, indeed, sometimes within the Grade A contours of other stations, as in the Washington-Baltimore, Cleveland-Akron, Pennsylvania and Connecticut cases referred to above. If affiliation with two stations with this degree of proximity and overlap is desirable in these situations, we fail to see why it would not be in other situations such as Marion and others mentioned.

57. Over-all, the performance of the networks in this area is not to be criticized too harshly; as mentioned, the distribution of their programs is fairly widespread, and we note that they provide programs to some stations in very small markets which are isolated from other stations (e.g., Flagstaff, Arizona and Miles City, Montana). Moreover,

as noted above, we recognize that this subject is a complex one, and the formulation of appropriate standards might well be difficult. None of the stations mentioned above is situated so that there is no possibility of service in its city for existing affiliates of three networks (except Pocatello). Nonetheless, we find the unavailability of network programs in the Marion situation, and some of the other similar cases mentioned, an unsatisfactory situation which must be improved. We will expect the networks to review the policies and practices under which they enter into affiliation arrangements or otherwise furnish programs to stations, to keep attuned to the public need for an expanded television service. We will expect a report by June 1971, as discussed below.

58. Mention was made earlier, in connection with the "uncleared program" problem, of the *compensation* paid to UHF stations when the regular affiliate in the market does not clear the program, in which respect the situation does not appear satisfactory. The same is likely true in the present connection also, but this aspect of the matter appears of less importance. We recognize that in some of these "small market" situations the number of viewers which the station would add to the network lineup if included in it may be small, and therefore it may not be practical to expect a high level of remuneration from the networks in some cases. The emphasis in this part of the proceeding is rather on the *availability* of network programs, which can serve the station economically by helping it to sell adjacencies and building an audience and establishing a position, as well as through whatever compensation it may get from the network. However, it is noted that numerous small-market stations presently appear to receive little or nothing from the networks. According to the current network *Standard Rate and Data Service* a number of stations listed as affiliates are not given a "network rate", and therefore presumably receive no compensation. Others have

extremely low network rates, less than $100 per prime time hour. We hope that, to the extent these stations add value to the network's lineup, ways can be found to bring them increased compensation.

Over-All Conclusions and Order

59. As stated above, while the adoption of specific rules does not appear appropriate at this time, the situation with respect to the distribution of network programs appears unsatisfactory in a number of respects, and in our judgment must be improved if the public interest in increased television service and the development of UHF stations is to be furthered. Four of these relate to the placement of "uncleared" network programs, those not carried by regular affiliates in the market, and have been mentioned in paragraphs 30 and 41 above: (1) *more rigorous efforts to place on alternate stations* all "uncleared" programs, including those not taken by the regular affiliate only occasionally or part of the time, and "one-shot" programs; (2) *adequate notice to alternate stations* that a program will not be cleared by the affiliate and will thus be available to other stations; (3) *a reasonable level of compensation* to the independent stations carrying the program; and (4) *recapture practices which afford a reasonable degree of stability* to the independent, which appear to include the minimum of 13 weeks run without recapture now granted by ABC and CBS. The fifth matter, discussed in the immediately preceding paragraphs, is the availability of programs to "small-market" stations, an area where the networks' practices and policies appear to have been too restrictive so that numerous such stations are unable to obtain desirable program product and thus their survival is endangered or becomes impossible.

60. In our view, for reasons stated herein, the public interest requires an improvement in the networks' performance in these respects, and we expect it to be improved in

the near future. While we are not now adopting any rul in these areas, we will require the networks to report in th near future, by June 30, 1971, a period some seven mont hence, on their policies and practices in the respects me tioned above. This proceeding is being kept open for th receipt of this information and whatever subsequent con sideration and action may be indicated.

61. In view of the foregoing, IT IS ORDERED, That th three national television networks, American Broadcasting Companies, Inc., Columbia Broadcasting System, Inc., and National Broadcasting Company, Inc., SHALL REPORT TO THE COMMISSION, on or before June 30, 1971, as to their policies and practices current at that time as to the five matters mentioned in paragraphs 30, 41, 51–57 and 59 hereinabove. This action is taken pursuant to Sections 303(g) and (i) and 403 of the Communications Act of 1934, as amended.

Federal Communications Commission,

Ben F. Waple,
Secretary.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-362

WINCHESTER TV CABLE CO., INC., ET AL.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA IN OPPOSITION

Petitioners are operators of community antenna television ("CATV") systems in Winchester and Front Royal, Virginia. Both systems carry the programming of the Washington, D. C., station WRC-TV, a National Broadcasting Company ("NBC") affilate. In January 1970, the Hagerstown, Maryland,

station WHAG-TV commenced operation, also as an NBC affiliate. Winchester is within the principal community contours of WHAG-TV and Front Royal is within that station's Grade B contours. (Contour designations are based on a station's predicted signal strength.) Neither Winchester nor Front Royal is within the Grade B contours of WRC-TV. As a consequence, in the areas served by petitioners WHAG-TV has a higher priority than WRC-TV for purposes of the Federal Communications Commission's nonduplication rule, 47 C.F.R. 76.91, 76.93 and 76.95, 37 Fed. Reg. 3285-3286 (Pet. App. E, 21a-27a).[1] This rule provides, in effect, that CATV systems may not carry programming of one station which duplicates the simultaneous programming of another station with higher priority. Under this rule, petitioners are prohibited from transmitting the NBC programs of WRC-TV at the same time that those programs are being shown on WHAG-TV.

Petitioners' requests for waiver of the nonduplication rule were summarily denied by the Commission. 29 F.C.C. 2d 432 (Pet. App. B, 11a-13a); 30 F.C.C. 2d 610 (Pet. App. C, 14a-19a). The court of appeals affirmed. 462 F. 2d 115 (Pet. App. A, 1a-10a).

Petitioners' sole contentions here are that the nonduplication rule exceeds the Commission's statutory authority and denies equal protection of the laws to CATV operators and subscribers.

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[1] The substance of the nonduplication rule was contained in 47 C.F.R. 74.1103 at the time the proceeding before the Commission was initiated.

1. In *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, this Court recognized the Commission's authority to regulate CATV through the issuance of rules "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting" (*id.* at 178). The nonduplication rule involved here falls well within that authority.[2]

Under Section 303(g) and (h) of the Communications Act, 47 U.S.C. 303(g) and (h), the Commission is required to "encourage the larger and more effective use of radio in the public interest" and is authorized "to establish areas or zones to be served by any station." Section 307(b) of the Act, 47 U.S.C. 307(b), further provides that the Commission "shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient and equitable distribution of radio service * * *." In carrying out these responsibilities, the Commission has determined that the establishment and maintenance of local television service is a fundamental need of an informed citizenry; that these outlets for community expression are jeopardized by the competitive advantages of CATV systems; and that the nonduplication rule is necessary to the maintenance of the

[2] Petitioners argue primarily that the Commission is not authorized to regulate "reception" and thus has no authority over CATV systems. But this general issue was settled adversely to petitioners in *United States* v. *Southwestern Cable Co.*, *supra*. See, also, *United States* v. *Midwest Video Corp.*, 406 U.S. 649.

economic viability of local broadcasters. See *First Report and Order*, 38 F.C.C. 683; *Second Report and Order*, 2 F.C.C. 2d 725. As the court below correctly concluded in an earlier case, the nonduplication rule represents "a fair adjustment and accommodation of conflicting claims to first place in the public interest" and is a proper exercise of the Commission's authority to regulate CATV. *Wheeling Antenna Co.* v. *United States*, 391 F. 2d 179, 183 (C.A. 4). Moreover, the other courts of appeals which have reviewed the nonduplication rule also have upheld it as within the Commission's authority. *Great Falls Community TV Cable Co.* v. *Federal Communications Commission*, 416 F. 2d 238 (C.A. 9); *Titusville Cable TV, Inc.* v. *United States*, 404 F. 2d 1187 (C.A. 3); *Conley Electronics Corp.* v. *Federal Communications Commission*, 394 F. 2d 620 (C.A. 10).

2. Petitioners' challenge to the constitutionality of the nonduplication rule is based on the fact that the rule applies only to CATV systems, whereas simultaneous duplication of programming by broadcasting stations is not similarly prohibited. To the extent that any such discrimination exists,[*] however, it has a reasonable basis rooted in the basic purposes of the Communications Act.

In *Report and Order of Docket 16041*, 26 F.C.C. 2d 772, the Commission announced a policy of en-

[*] The court below took note of petitioners' constitutional contentions but regarded them as premature in light of the absence of any Commission rule permitting duplicative programming in the areas which petitioners serve.

couraging the establishment of network affiliates in small "market fringe areas" presently served only by distant stations located in central market areas. The creation of such affiliates would in many cases result in some duplication of network programming. Thus in a sense local broadcasters are accorded a privilege which the nonduplication rule denies to CATV systems. However, the ends served by *Docket 16041* and the nonduplication rule are the same: the establishment and maintenance of local television service. See *Television Antenna Cable, Inc.*, 30 F.C.C. 2d 610. In *Docket 16041* the Commission was encouraging the development of additional local broadcasting services; by its nonduplication rule the Commission seeks to prevent any diminution of local broadcasting services which might otherwise be occasioned by CATV activity. Both these policies are grounded in the Commission's reasonable determination that "the larger and more effective use of radio in the public interest" and the "fair, efficient and equitable distribution of radio service" will best be served by the establishment and maintenance of local television service. Since the distinction between broadcasters and CATV systems created by *Docket 16041* and the nonduplication rule therefore has a reasonable basis grounded in the policies of the Act, it does not constitute a denial of due process or of equal protection of the laws.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JOHN W. PETTIT,
General Counsel,
Federal Communications Commission.

OCTOBER 1972.

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